

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**IN INSOLVENCY****DISCHARGE APPLICATION NO. 1 OF 2014****IN****PETITION NO. 34 OF 2005****WITH****NOTICE OF MOTION NO. 35 OF 2015**

Re : 1. LAV CHADHA

2. NARESH CHADHA

both Debtors Nos.1 and 2
of Mumbai, Senior Citizens,
Indian Inhabnitants, having
their address at B-21, Ganga
Bhawan, J.P. Road, Andheri
[West], Mumbai 400 061.

...Insolvents

SICOM Limited, a company)
incorporated and registered)
under the Companies Act, 1956)
and having its registered office)
at "Nirmal", 1st Floor, Narimna)
Point, Mumbai 400 021.)

...Petitioning Creditors

Mr.Prathamesh Kamath i/b. T.N. Tripathi & Co. for Petitioning Creditor.
Mr.N.V. Vimadalal i/b. Vinod Solanki for Insolvent.

CORAM : S.C. GUPTE, J.**RESERVED ON : 27 OCTOBER 2015****PRONOUNCED ON : 23 FEBRUARY 2016****ORDER :**

This is a discharge application filed by two Insolvents, who are senior citizens and who claim that they have continued to be undischarged insolvents for more than 9 years; that their assets have been fully adminisitered;

and that it is time that they be relieved of the stigma that comes with insolvency in the last few years of their life. The application is under Section 38 of the Presidency-Towns Insolvency Act ("Act").

2 The Applicants' case, briefly, stated is this: The Applicants are both senior citizens, Applicant No.1 being of 65 years and Applicant No.2, 61 years. The Applicants have been first generation entrepreneurs with technical and managerial background, Applicant No.1 being a management graduate with experience in multi-national companies and Applicant No.2 being an engineering graduate with technical experience. In the year 1978, the Applicants started a small scale textile manufacturing unit, which had to be closed down at the time of the infamous textile strike led by Dr.Datta Samant. In the year 1985, the Applicants started a new company by the name of Prudential Polywebs Pvt.Ltd. Apart from the Applicants, there were other directors also of this company. For the company's new project at Amravati for production of plastic woven sacks, SICOM (Petitioning Creditors and Respondents to the present application) extended a term loan. This loan was against the security of mortgage of land, buildings, super-structures and plant & machinery of the company. In February 1987, the company started its commercial production. Soon thereafter, the Government of India introduced Jute Mandatory Packaging Materials Act banning all packaging materials for packing of fertilizers except jute. As a result, plastic woven sack units across the country went out of business, as nearly 99 per cent production of country's woven sacks was being used for packing of fertilizers. The Applicants' company, as a result, had to modify its unit for production of a particular grade of plastic woven sacks for filling of hot cement with foreign collaboration. The Applicants had to plan an IPO of Rs.4.25 crores in April 1993. Just few days before the public issue, serial bomb blasts occurred in Mumbai, including one at the Mumbai Stock Exchange. That was another set-back for the company. This was followed by labour agitation by two rival unions in the company. The capacity utilization went below the break even level. In addition to suffering penalties and liquidated damages, the company faced rioting and damage to its property due to violent labour agitation. There were even attempts on the life of the Applicants. All this resulted into erosion of the net worth of the

company and its account becoming NPA. The company was referred to BIFR. IDBI was appointed as an operating agency. The efforts to revive and rehabilitate the company did not bear fruits. On 16 August 2000, BIFR passed an order recommending winding up of the company. Soon thereafter, the Petitioning Creditor herein (SICOM) gave a notice under Section 29 of the State Financial Corporations Act. On 5 February 2001, SICOM took possession of the unit, in pursuance of this notice. The personal assets of the Applicants including their residential premises were taken over by Union Bank, who had given working capital to the company against the collateral security of these assets. The residential premises were auctioned by the DRT. The unit was sold by SICOM at a value much below its estimated valuation, and could not discharge the liability of SICOM. In the premises, SICOM, which held an ex parte decree for recovery of over Rs.1.5 crores against the Applicants in their capacity of guarantors of the term loan extended to the company, filed the present insolvency petition. By an ex-parte order dated 19 August 2006, the Applicants were declared insolvents. Subsequent to the insolvency of the Applicants, on 14 March 2008, even the company was ordered to be wound up.

3 Through the years preceding the present application, in the course of the insolvency proceedings, the Applicants duly filed their schedule of assets and liabilities. The public examination was concluded on 12 November 2013. A certificate dated 9 July 2014 was issued by the Official Assignee certifying the creditors. As per this certificate, there are three creditors, namely, (i) the Petitioning Creditor in the sum of about Rs.2.76 crores, (ii) LIC in the sum of Rs.19.32 thousands and (iii) Oriental Bank of Commerce for about Rs.2.9 thousand. There are no assets of the Applicants to be realized in insolvency as of date. The Applicants submit that they have not committed any offence under the provisions of the Act or under sections 421 to 424 of IPC. More than 9 years have now passed, at the end of which the Applicants continue to be undischarged insolvents. The Applicants, who are now senior citizens, have, in the premises, moved the present application for discharge under Section 38, claiming to be rid of the ignominy of undischarged insolvency at this phase of their life. It is submitted that the Applicants do not attract any of the disabling provisions of

Section 39 for claiming a discharge.

4 Both the Official Assignee and the Petitioning Creditor oppose this application. It is submitted by the latter that the Applicants have not discharged the statutorily required minimum dues for claiming a discharge. It is submitted that the Applicants have not surrendered all their assets or indicated true and correct picture of their financial position. It is particularly submitted that the Applicants are holding a residential property through a circuitous transaction. It is submitted that the public examination was closed in a hurried manner and there was no effective closure of the same. As for the Official Assignee, he has filed a report as of 27 February 2015. The report indicates the total debt owed by the Insolvents and the total recoveries made in insolvency. The report also shows that both private and public examinations of the Applicants have been duly concluded. The only amount in the account of the estate is Rs.5,13,306.75 against the total debts indicated above. The entire debts due to the estate, including the surrender value of L.I.C. policies of the Applicants, have been recovered. There is nothing to recover further. The Official Assignee, however, submits that since the insolvents' assets are not of a value equal to four annas in a rupee, the case is covered by Sub-sections (a) and (e) of Section 39(2) of the Act.

5 The emerging picture, accordingly, is this: The private and public examinations of the insolvents have been fully accomplished and a fair conclusion can be drawn that the Applicants have fully and truly disclosed their assets and financial affairs. Neither the Petitioning Creditor nor the Assignee could point out any particular discrepancy or shortcoming in the disclosure. The assets of the Insolvents have been fully recovered and there is nothing further to be done in the matter of administration in insolvency. At the end of the day, i.e. more than nine years after the adjudication, the insolvents remain undischarged with debts owed by the estate aggregating to Rs.2,76,62,293/- and the fund available in the estate account (after realization of all assets of the estate) being Rs.5,13,306/-. The estate is not in a position, obviously, to pay twenty-five paise in a rupee to the creditors. The question now is, whether the insolvents should be

ordered to be discharged under Section 38 or should discharge be refused under Section 39.

6 Under Section 38, there is no difficulty with the hearing of the discharge application. The public examination has been concluded. The report of the Official Assignee as to the insolvents' conduct and affairs is not in any way adverse. In the premises, subject to the provisions of Section 39, there is an option to the Court to either -

- (a) grant or refuse absolute discharge, or
- (b) suspend the operation of the order for a specific time, or
- (c) grant an order of discharge subject to conditions concerning earning or income accruing afterwards or after-acquired property.

Section 39 requires the court to refuse discharge in a case where the insolvent has committed any offence under the Act or Sections 421 to 424 of IPC. That is not the case here. The Official Assignee has observed in his report of 27 February 2015 that there is no such offence committed by the Applicants. There is no proof as to the other facts mentioned in sub-section (2) of Section 39 so as to deny discharge to the Applicants. The insolvents' assets are, however, not of a value equal to twenty-five paise in a rupee on the amounts of their unsecured liabilities. If that be the case, the options before the court are either -

- (a) to refuse the discharge; or
- (b) suspend the discharge for a specified time; or
- (c) suspend the discharge until a dividend of not less than twenty-five paise in the rupee has been paid to the creditors; or
- (d) require the insolvents as a condition of discharge to consent to a decree being passed against them and in favour of the Official Assignee for balance of the debts provable in insolvency which are not satisfied at the date of discharge, such balance to be paid out of future earnings or after-acquired property of the insolvents subject to terms and conditions.

This, of course, is subject to a rider that the court is not satisfied that the fact that the assets are not of such value has arisen from circumstances for

which the insolvents cannot be justly held responsible. For, if the insolvents satisfy the court as to the aforesaid fact, the court would be justified in even granting an absolute discharge, apart from making any of the other orders, namely, refusal of absolute order of discharge or suspension or conditional discharge, as the case may be.

7 Whether the insufficiency of assets was due to circumstances for which the insolvent could not justly be held responsible is a question to be determined by the court and the burden of establishing this is on the insolvent. This much is clear. But the question is, what kind of proof or explanation needs to be furnished by the insolvent for the satisfaction of the court about existence of such circumstances. The proof cannot be of there being no circumstance for which the insolvent could be held responsible. That is a negative burden, which the insolvent is not expected to discharge. It must be for the opponents of the discharge application to establish that there is such circumstance for which the insolvent was actually responsible. All that the insolvent must show to the court is that the insolvency has come about despite the insolvent having conducted his affairs in a business like manner and he has fully co-operated with the Official Assignee for recovery of his assets in insolvency. If the insolvent satisfies the court about these two circumstances, and the opponents cannot show either that the insolvent was actually responsible for the fact that his assets are not equal to twenty five paise in a rupee on account of unsecured liabilities or that such deficiency of assets is due to lack of co-operation on the part of insolvent in the endeavours of the Assignee to recover assets in insolvency, there should be no difficulty in the court arriving at a satisfaction that the fact that the assets are so deficient has arisen from circumstances for which the insolvent cannot be justly held responsible. There may be cases, where even after both sides produce material before the court for its consideration, there is still no satisfactory explanation why large debts over and above of the value of his total assets were incurred by the insolvent. As the scheme of Sections 38 and 39 indicates, that, however, cannot be a sole ground for refusal of discharge. After all, this scheme requires the court to be satisfied that the deficiency of assets has arisen from circumstances for which the insolvent cannot be justly held responsible. That

there is no satisfactory explanation how this deficiency has come about is consistent with the finding that there is nothing to suggest that it has come about as a result of any act on the part of the insolvent. In other words, it is still possible for the court to record its satisfaction that the deficiency of assets has arisen from circumstances for which the insolvent cannot be justly held responsible, if the insolvent makes out the two circumstances mentioned above and the opponents are not able to show to the contrary. I am fortified in this view by a judgment of Madras High Court in the case of **Abdul Nabi vs. Kallappa Rajappa**¹, where the court held that the discharge could not be refused solely on the ground that there was no satisfactory explanation as to why large debts were incurred or that a false explanation was given that they were incurred by the insolvent's father.

8 Coming now to the facts of our case, the Applicants have explained how the company, whose debt to the Petitioning Creditor was guaranteed by them, came to be sick and how despite attempts of the Applicants to revive and rehabilitate, it came to be wound up. They have explained the circumstances how their personal assets came to be disposed of in the course of DRT proceedings to pay the debts of creditors and how thereafter they came to be adjudged insolvents. The Applicants can be fairly said to have made out a case that despite their businesslike efforts they came upon the present insolvency. This case of the Applicants has hardly been joined issues with by either the Assignee or the Petitioning Creditor. Neither the Assignee nor the opposing creditor has shown any circumstance giving rise to deficiency of assets, for which the Applicants could be said to be responsible. So also, the report of the Official Assignee indicates that the Appellants have fully co-operated with the Assignee for recovery of assets upon insolvency and despite diligent administration, the Official Assignee could not be secure any further assets. Nothing can be shown by the Petitioning Creditor either in the private or public examination of the Applicants or otherwise that the Applicants have not indicated true and correct picture of their financial position. The only case urged before this court at the hearing was that the IT returns of the Applicants were not produced before the Official Assignee. This circumstance is adequately explained by the Applicants.

1 AIR 1936 MADRAS 800

They have, they say, not filed any IT return for all these years. The Applicants claim to be doing odd jobs and paying Rs.500 and Rs.1000 per month to the Assignee from their present earning. There is nothing to show that they have any taxable income. The Applicants' residence at 13-21, Ganga Bhavan, Andheri (West), Mumbai has also been adequately explained. This property, which originally belonged to the Applicants, was sold before their insolvency in a DRT auction. It was purchased by one IPSL Export Pvt.Ltd. and afterwards taken on leave and licence by Medasa Investments Pvt.Ltd., where wife of Applicant No.2, who is a director, resides. The Applicants are residing there as her family members. There is record before the court supporting this case. That leaves the only point about the public examination of the Applicants. The Petitioning Creditor has claimed that it was hurriedly concluded. There is nothing to support that. The Official Assignee's Report does not indicate so. What emerges from the record is that the advocate of the Petitioning Creditor has not chosen to appear at the public examination after 31 July 2013; The meetings, though, have been duly held with notice to all stakeholders. After hearing and granting sufficient opportunity to everyone, the public examination has been duly concluded by the Official Assignee. There is nothing to be done further in the matter now.

9 If it was the case of the Petitioning Creditor that further public examination of the insolvent needs to be held including cross-examination by counsel for the Petitioning Creditor, such application ought to have been made before the insolvents applied for their discharge. Our court in the case of **re FARDUNJI DADABHAI DARUVALA**² has held that an application for public examination of the insolvent must be made before the insolvent applies for discharge and that it was too late to make an application when the petition for discharge was on board for final hearing, except in very special circumstances.

10 As held by Madras High Court in the case of **T.P. Kunhiraman vs. Official Assignee, Madras**³, the law of bankruptcy does not expect that the debtor should always be the slave of the creditors; the object is to release the

² The Bombay Law Reporter VI.XXVI page 627

³ AIR 1983 MADRAS 148

debtor at an appropriate time, taking into consideration several factors referred to in Section 39 of the Act. As far as deficient value of assets, namely, below twenty-five paise in a rupee by way of dividend is concerned, this is what Madras High Court said in that case:

“5. As regards the complaint that the insolvent has not provided 25 ps. in a rupee, by way of dividend, I am to state that it is one among several circumstances, the court has to take into consideration while dealing with an application for discharge. I have already pointed out that the debtor should not remain an undischarged insolvent for ever. In a case where there is a fair probability of the debtor providing in a reasonable period the minimum of 25 ps. in the rupee as dividend the court shall hesitate in granting discharge. In the instant case, he will have to remain an undischarged insolvent almost for his lifetime if this condition were to be imposed as a general rule, for it would take 161 months to make up Rs. 32,300 at Rs. 200 per month. The above illustration gives a clue that that was not the intent of the Legislature in making that provision.”

I am in respectful agreement with the above observations.

11 The insolvents have not attracted any of the disabilities mentioned in Section 39 of the Act. The Applicants have remained undischarged insolvents for over 9 years. They are now in the evening of their life. There is no reason why under Section 38 of the Act, they should not be discharged and relieved of the stigma of bankruptcy, which is ordinarily viewed with contempt by the society at large. At the same time, it is in the interest of justice that the insolvents are discharged subject to conditions regarding future earnings and income of the insolvents as also acquisition of property by the insolvents hereafter. Whilst considering the future income and acquisition, it is reasonable to take into account the decretal dues only of the Petitioning Creditor, since the other dues in comparison are wholly insignificant and neither of the other two creditors contests this application for discharge.

12 In the premises, the following order is passed :

(a) Applicant Nos.1 and 2 are discharged from insolvency subject to their continuing to pay the sums of Rs.500 and Rs.1000 per month to the Petitioning Creditor until further orders;

(b) In the event the Applicants do, or any of them does, acquire any property hereafter, the same shall be liable to be made available for payment of decretal dues of the Petitioning Creditor;

(c) So also, future income or earnings of the Applicants over and above the requirement of subsistence shall be liable to be made available for payment of the decretal dues of the Petitioning Creditor;

(d) The Applicants shall file six monthly return of their property and income before this Court with copy to the Petitioning Creditor until further orders;

(e) The Insolvency Court shall pass appropriate orders, if any, concerning payment of decretal dues of the Petitioning Creditor upon filing of such reports and application by the Petitioning Creditor in that behalf;

(f) The Official Assignee shall, after recovering administration expenses in insolvency, declare a final dividend to the three creditors mentioned in his report from out of the funds available to the credit of the estate as of this date;

(g) No order as to costs.

the order is stayed for a period of two weeks from today.

14 In view of the order passed today on the Discharge Application of the Insolvents, the notice of motion taken out by the Petitioning Creditor does not survive and the same is dismissed.

(S.C. Gupte, J.)